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No. 87-62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD and PAMELA SCHMIDT,
Petitioners,

v.

OHIO,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MICHAEL P. FARRIS
President
Home School Legal Defense Association
731 Walker Road
Suite E2
Great Falls, VA 22066
(703) 759-7577
Attorney for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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ARGUMENT

I

OHIO CITES NO AUTHORITY FOR THE PROPOSITION THAT A PERSON CANNOT RAISE CONSTITUTIONAL CHALLENGES TO A LICENSING STATUTE WHEN PROSECUTED FOR FAILURE TO SEEK A LICENSE

The prosecuting attorney was directed by the Court to file a brief in opposition to our petition for a writ of certiorari after previously having waived

response. We file this reply brief to respond to the arguments raised in the requested brief.

The State of Ohio contends that its Supreme Court correctly held that a person may not challenge the constitutionality of a statute requiring advance government approval of home schooling unless there has been an attempt to secure government approval and such approval has been denied. No cases are cited by the State of Ohio for this proposition. The crux of their argument is that such an application is necessary for a "balancing process" required in First Amendment analysis.

We note that our primary argument in this case has always been that the Ohio law is void for vagueness because each local school superintendent is permitted to enforce whatever self-created stan-

dards he desires for approval or disapproval of a home schooling request. There is no "balancing process" required in void for vagueness analysis. Superintendents can approve those they deem qualified and reject those deemed unqualified for reasons that exist solely in their own minds.

Nothing in this Court's void for vagueness decisions requires a person to submit to such a process as a precondition to challenging the law on constitutional grounds in a criminal prosecution brought to enforce the statute.

The dissenting judges in the State Supreme Court correctly pointed to this Court's decisions in Thornhill v. Alabama, 310 U.S. 88 (1940); Staub v. Baxley; and Lovell v. Griffin, 303 U.S. 444 (1938), for the proposition that, "[o]ne who might have had a license for the

asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it." Thornhill, 310 U.S., at 97.

The prosecutor argues that the Ohio Supreme Court was correct when it said, "The case sub judice does not fall within the reach of Wisconsin v. Yoder, 406 U.S. 205 (1972)." The alleged distinguishing reason is that the Schmidts failed to apply for a religious exemption and thus could not raise substantive constitutional arguments. However, this misreads Yoder. In Yoder, just as here, the families did not comply with the existing law regulating compulsory education and raised their substantive constitutional challenges as defenses to criminal prosecution for truancy. That is the exact same posture as present in this case. The Schmidts have been criminally

prosecuted. There is no reason to distinguish these cases in such a way as to preclude the Schmidts the right to raise substantive constitutional defenses.

No cases were cited by Ohio to demonstrate that the dissenters in the State Supreme Court were not correct on this matter. This Court's decisions have not been followed by the majority of the State Supreme Court. Certiorari is necessary to review this matter on this crucial point.

II

THE PROSECUTOR SERIOUSLY MISSTATES OHIO LAW IN AN ATTEMPT TO AVOID OUR VOID FOR VAGUENESS ARGUMENTS

The State of Ohio cites the case of an unpublished decision Fresh v. Searcy, Case No. 1172, Court of Appeals, Astabula County, (April 5, 1985) for the proposition that Ohio's law is not unconstitu-

tionally vague. That decision makes no such holding nor does it even discuss the issue of vagueness.[1]

However, another recent unpublished opinion, In the Matter of Appeal of Zelda Snyder,[2] Court of Appeals, Fifth Appellate District (Knox County), November 20, 1986, did discuss the issue of vagueness and reached the conclusion that Ohio Rev. Code § 3321.02 (A) (2) is unconstitutionally vague.

> The legislature has provided no standards for the guidance of superintendents in their passing on requests for home instruction excuses in § 3321.04 (A) (2). . . . The state board of education has promulgated no standards in compliance with the dictates of § 3321.03 (C) as to home

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[1]We reproduce this decision in the Appendix at 21a. (Note: all decisions reproduced in the Appendix are quoted in full, and typographical, grammatical, and other errors have been included without the addition of "sic" at each occurrence.)

[2]We reprint this decision in its entirety in the Appendix beginning at 1a.

> teaching which is authorized under § 3321.04 (A) (2).
>
> . . .
>
> As to instructor competency, the statutory requirement is only that the instructor be qualified to teach the subjects "in which instruction is required" but provides no standard to determine what constitutes being qualified to teach one's own children.
>
> We agree with the trial court that § 3321.04 (A) (2). . ., sets "no guidelines, no limits" and "is too vague to be of any assistance to the Superintendent in the exercise of [his] judgment."

Appendix at 14a-18a.

The assertion of the Prosecuting Attorney that "Ohio has clear and unequivocal rules governing home study programs", Brief In Opposition, at 7, is obviously false in light of the Ohio Court of Appeals' statements in Snyder just quoted. Contrary to the assertions of the Prosecutor, Ohio v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976), does not give "explicit rules and regula-

tions concerning home schooling." This case does not even concern home schooling. In fact it held that Ohio law was unconstitutional as applied to religious schools because of excessive regulations. It is simply unconscionable for the Prosecutor to attempt to misuse Whisner in such a blatant manner.

Moreover, his assertion that the State Board of Education "has promulgated minimum standards which specifically outline the course of study, hours per day in attendance, and qualification of teachers" is equally false. If such regulations exist it would have behooved the prosecutor to cite them. The Court of Appeals in Snyder said that no such regulations exist for home schools. If they did exist certainly the Supreme Court of Ohio would have cited them to answer the Schmidts' allegation that

there are no such regulations. The prosecutor's assertion is a naked fabrication.

In fact, the Legal Counsel for the Buckeye Association of School Administrators, (the State Association of Superintendents), has bemoaned the Schmidt decision for its failure to wrestle with the fact that there are no guidelines defining who is "qualified" to teach a child at home. In a regular publication[3] circulated to all administrators in Ohio, Robert T. Baker, Legal Counsel writes:

> [I]t is important to recognize what the Schmidt case does not do. It does not help school superintendents decide what is an acceptable home instruction program, or what a "qualified" instructor is. Nor does the Schmidt case tell a superintendent how far he can go before he will be deemed to have "infringed" the par-

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[3]This entire publication called "On Advice of Counsel", subtitled, "Getting A Handle on Home Instruction," is reprinted in the Appendix at 42a.

> ents' constitutional rights. In view of these uncertainties, I would counsel superintendents to make accommodations wherever possible on home instruction requests, and to avoid over-rigorous requirements which could be viewed as contrary to the spirit of the home instruction law or an infringement upon the parents' freedom of religion.

Appendix at 47a-48a. In this same publication, after quoting the statute in question, counsel for the state school administrators opines, "This language is obviously far from clear." Appendix at 44a. If the legal counsel for the State School administrators labels the term "qualified" an "uncertainty" and the statute itself "far from clear" in the law, it should be obvious that we are dealing with a law which is unconstitutionally vague. The prosecutor's misrepresentations of the state of the law in Ohio cannot be countenanced. Certiorari is necessary to review the con-

stitutionality of an obviously vague law which has been applied to convict the Schmidt's of a crime.

III

OUR DUE PROCESS CHALLENGE TO OHIO'S USE OF A FINANCIALLY INTERESTED DECISION-MAKER WAS RAISED BELOW

In our petition for certiorari we argue that Ohio law violates the Due Process Clause because it gives a due process decision to a person with a financial stake in the outcome. The prosecutor responds arguing that this issue was not raised in the State Court of Appeals or in the Supreme Court of Ohio. Brief in Opposition at 8. This is not the case. We have from the beginning of this case argued that giving the local school superintendent unbridled discretion to make a decision to approve or disapprove a home school violates the Due Process Clause. The argument that he has

a financial stake in the outcome is an argument supporting an issue which has been raised throughout.

To say that this was not raised in the Courts below is simply not true. For example, in the Supreme Court of Ohio brief filed by the Schmidts, this argument is specifically raised in support of our argument that the Due Process Clause has been violated by giving total discretion to the local superintendent on pages 50-51. We argued, inter alia:

> One of the principles of due process requires that when a person must come to the government for a decision, the citizen is entitled to a neutral decision maker who has no financial stake in the outcome. Tumey v. Ohio, (1927) 273 U.S. 510.

Brief of Schmidts before the Ohio Supreme Court at 50. We also cite the recent federal district court case of Fellowship Baptist Church v. Benton, 620 F.Supp. 308 (S.D. Iowa 1985); aff'd 815 F.2d 486 (8th

Cir. 1986), for this proposition. We quoted the following passage from the district court's opinion:

> The Court cannot leave this issue without pointing out other troubling matters. There may be problems when the responsibility of determining equivalent education is placed on local school boards even when it is more closely defined for two reasons. First each local school board may still have a different interpretation. Second, local school boards have an inherent conflict of interest since each student in a private school is potentially a source of additional state aid. Some other procedure might eliminate future litigation.

620 F. Supp. at 318. (Quoted at page 51 of said brief.)

We concluded our discussion of the Due Process Clause arguing:

> No local school superintendent should ever be allowed to decide whether an alternative form of education will be allowed to be practiced in his community. This is especially true when, as here, this decision is permitted to be made as a matter of "mere opinion" by a person with a financial stake in the outcome.

Brief at 51. It is clearly erroneous to argue that we raised this issue for the first time in this Court.

IV

WHILE WE RECOGNIZE A COMPELLING STATE INTEREST IN EDUCATION OHIO VIOLATES THE FREE EXERCISE CLAUSE BY BURDENING THE EXERCISE OF RELIGION WITHOUT EMPLOYING THE LEAST RESTRICTIVE MEANS OF ACHIEVING ITS GOAL

The Schmidts' free exercise arguments have been mischaracterized as "contend-[ing] their religion prevents them from having to be regulated by the state, no matter how slight, regarding the education of their daughter." Brief in Opposition at 12. At every stage of this proceeding, we have conceded that Ohio has a compelling state interest in the education of all children in the state. Our challenge is that Ohio has not adopted the least restrictive means in regulating home schooling. We point to the

twenty-two other states which have adopted statutes specifically dealing with home schooling to demonstrate that it is possible to achieve the state's interest in ensuring an adequate education without adopting a system which delegates unbridled discretion to local authorities.

There are twenty-two other states[4]

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[4]These states are: Arizona, Ariz. Rev. Stat. § 15-802, enacted 1982; Arkansas, Ark. Stat. § 80-1503.4, et seq., enacted 1985; Colorado, C.R.S. § 22-33-104 (2) (i) enacted in 1963; Florida, Chapter 85-144, Laws of Florida, F.S.A. § 228.041, enacted 1985; Georgia, Geo. Code Ann. § 32-2104 (b), enacted 1984; Louisiana, LSA-R.S. § 17:236.1, enacted 1984; Minnesota, Minn. Stat. Ann. § 120.101 (1987); Mississippi, Miss. Code Ann. § 37-13-91 (3) (c) enacted 1982; Missouri, § 167.031 R.S.Mo., enacted 1986; Montana, Mont. Stat. § 20-5-102 (2) (f) enacted 1983; Nevada, N.R.S. 392.070, enacted 1956, see also Nev. Admin. Code Chap. 392 §§ 2-8, issued in 1984; New Mexico, N.M.S.A. § 22-1-2 (U), and § 22-1-2.1, enacted 1985; Oregon, O.R.S. § 339.030 (6), enacted 1985; Rhode Island, § 16-19-1 General Laws of Rhode Island, enacted 1984; Tennessee, T.C.A. § 49-6-3050, enacted 1985; Utah, Utah Code Ann. § 53-24-1 (2), enacted 1957;

which have adopted statutes specifically dealing with home schooling since 1956.

In reaching a decision on the least restrictive means issue, this Court has often looked to the experience of other states as a part of the evaluation of a claimed compelling state interest. See, e.g., McDaniel v. Paty, 435 U.S. 618 (1978). In McDaniel, the Court held that although many states once held the view that clergy disqualification was necessary for the good of the principles of disestablishment,

> The essence of this aspect of our national history is that in all but a few States the selection or rejection of clergymen for public office soon

---

Vermont, V.S.A. § 1121 (2), enacted 1987; Virginia, Code of Virginia § 22.1-254.1, enacted 1984; Washington, R.C.W. § 28A.27.010 (4), enacted 1985; West Virginia, W.Va. Code § 18-8-1, enacted 1987; Wisconsin, 1983 Wisconsin Act 512, Wisc. Stat. § 115.01 (1r), § 118.15 (4), § 118.165 (1), enacted 1983; Wyoming, W.S. § 21-4-101, et. seq., enacted 1985.

> came to be viewed as something safely left to the good sense and desires of the people.

435 U.S., at 625.

Comparison to other states has also been made by the U.S. Supreme Court for the purpose of evaluating the least restrictive means tests. See, e.g., Thomas v. Review Board, 450 U.S. 707, 719 (1981) ["there is no evidence in the record to indicate that such inquiries will occur in Indiana, or that they have occurred in any of the states that extend benefits to people in the petitioner's position." [Emphasis added.]

To suggest that states cannot or have not created any other type of statutory scheme other than the "unbridled discretion" model employed in Ohio is simply not correct. The vast majority of the

twenty-two other states[5] which have enacted home school legislation have done so after the spate of decisions holding previous statutes void for vagueness. These newer statutes usually create several alternatives which are clear and not left to an official's unbridled discretion in qualifying parents to instruct their children while maintaining the state's interest in education.

It is a straw man to argue that if the Schmidts prevail on First Amendment grounds states will not be able to appropriately regulate home schooling. We simply ask that such regulation comply with the First and Fourteenth Amendments.

---

[5]Home schooling is legal in every state in this country, although only twenty-three states have laws specifically dealing with home schooling. In the other states, home schooling is permitted under the general laws regulating private schooling.

The crucial issue in this case on Free Exercise grounds is the issue of "burden." The Supreme Court of Ohio held that the Schmidts were not burdened because they did not seek approval. We argue that they were burdened because they were convicted of a crime for following the dictates of their religious convictions. This is a classic burden of Free Exercise. Numerous states permit home schooling without requiring religious home schoolers to submit requests to authoritiea with unlimited discretion.

This is a discretionary prior restraint on the free exercise of religion. It is as much a burden on the free exercise of religion as a parallel provision would be in the arena of the freedom of the press. A newspaper which refuses to comply with a vague law which demands that it receive prior approval from a

local official who possesses total discretion to permit or deny publication can certainly raise both vagueness and First Amendment challenges to such a law. This is what we seek to do here.

CONCLUSION

Nothing which has been said by the prosecuting attorney changes the necessity of review by this Court of the decision issued below by the Ohio Supreme Court. As noted by the dissenting judges below, that court failed to follow correctly the clear precedents of this Court with regard to due process and free exercise. We respectfully urge the issuance of a writ of certiorari.

Respectfully submitted,

MICHAEL P. FARRIS
Attorney for Petitioners
Home School Legal Defense Association
731 Walker Road, Suite E-2
Great Falls, Virginia 22066
(703) 759-7577

APPENDIX

IN THE COURT OF APPEALS FOR
KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

In the Matter of: Appeal of Zelda Snyder, Section 3331.08

JUDGMENT ENTRY

Case No. 86-CA-14

Wise, J.

This is an appeal from a judgment entered by the Court of Common Pleas of Knox County, Juvenile Division, overruling the decision of J.S. Short, Knox County Superintendent of Schools (Superintendent), and directing him to excuse from attendance at school the two children of Zelda Snyder (appellee) "for the reason that they are being instructed at home."

Superintendent appeals and argues the following two assignments of error:

I. THE KNOX COUNTY JUVENILE COURT ERRORED (sic) WHEN IT FOUND OHIO REVISED CODE SECTION 3321.04 DID NOT ALLOW THE COUNTY SCHOOL BOARDS/SUPERINTENDENT OF SCHOOLS TO SET MINIMUM STANDARDS FOR THOSE INDIVIDUALS DESIRING TO TEACH CHILDREN AT HOME.

II. THE KNOX COUNTY JUVENILE COURT ERRORED (sic) WHEN IT FOUND OHIO ADMINISTRATIVE CODE SECTION 3301-35-08 DID NOT INCLUDE IN HOME SCHOOLING, AND HENCE FAILED TO SET THE MINIMUM STANDARDS FOR INDIVIDUALS DESIRING TO TEACH THEIR CHILDREN IN THEIR OWN HOMES BY VIRTUE OF SAID IN-HOME SCHOOL BEING A NON-TAX, NON-CHARTERED SCHOOL.

Appellee is the mother of two children of "compulsory school age." See R.C. 3321.01. Appellee requested Superintendent to excuse her children from compulsory attendance at school and to permit her to instruct them at home, pursuant to R.C. 3321.04(A)(2). Appellee presented two reasons for her request: 1) the children's mental condition is such that it is detrimental to the children to be

in a regularly scheduled school program; and, 2) the school's educational curriculum is in direct contrast to the mother's sincerely held religious beliefs. Superintendent denied the request for home instruction. The denial was based upon Superintendent's interpretation of R.C. 3321.04, finding that the children were not "being instructed at home by a person qualified to teach" because Ohio Administrative Code §3301-35-08(D) requires teachers of non-chartered, non-tax supported schools to "have received a bachelor's degree or the equivalent thereof from a recognized college or university," and appellee has no such degree; further, that the proposed home instruction was not in accordance with Knox County Board of Education policy. Pursuant to R.C. 3331.08, appellee appealed to the Knox County Juven-

ile Court.

At this juncture, we wish to extend our compliments to all concerned by favorably quoting the following paragraph from the trial court's opinion.

> First off let me comment that this is a civil case. Most of the cases on this subject are criminal cases brought under Section 3321.28 which provides a criminal sanction. I believe this has caused the opinions in the cases to be of a strained variety in thinking and also to reflect the higher standard of proof required in criminal cases. The cases are sometimes of little value as it is evident that points are being stretched in order to give good people with good intentions every benefit of the doubt rather than invoke a criminal sanction. I compliment the Prosecutor of Knox County and his staff in directing this case to the civil side of the Court. I do believe more thought can be given to what has become a popular matter using the civil forum, and perhaps better solutions obtained.

We also here point out that appellee did not brief the issues in the case at bar as being primarily religious, and

counsel, at oral hearing before this court, agreed that religion was not the primary concern.

On appeal to the Juvenile Court, that court on the basis of Fresh v. Searcy Superintendent of Schools (April 5, 1985), Ashtabula County App. No. 1172, unreported, "chose to remand the matter to the superintendent to comply with Section 2506 of the Revised Code and hold the hearing and furnish the court with the transcript of the proceedings and the record." This having been accomplished, the trial court conducted a hearing on April 21, 1986, and issued his opinion on June 9, 1986. The trial court stated in his opinion at page 5:

> My findings are thus. Section 3321.04 is an improper delegation of legislative power to the Superintendent . . .

Further, at page 6, the trial court

states:

> The denial was based solely on reliance of the Knox County Board of Education Policy. No other consideration was given to the proposal of the applicant or an (sic) determination of reasonableness under the circumstances was made by the Superintendent.
>
> This Court finds itself in the same place the Whisner and Olin Courts found themselves when called to rule upon the qualifications of a non-public school. The Court stated in those two cases that it could not do this absent some regulations to follow. When asked to follow the regulations for the public school the court answered that those regulations do not pertain to non-public schools, or to the educational problem, citing the regulations for a flag pole to be erected. I have been asked here to follow Adm. Code Section 3301-35-08 in regard requests for an excuse for home instruction. As set forth above this section does not apply.
>
> It is to be noted that when the Supreme Court set forth its problem the State School Board did react with the Administrative Code Section, which has eliminated alot (sic) of litigation in the non-public school area.
>
> Until the legislature or the State School Board acts to set standards for home instructions excuse there is very little a Court can do but grant

> appeals. Really the only grounds for denial that could be exercised by the Superintendent in (sic) fraud or insincere application.
>
> Thus I overrule the decision of the Superintendent and direct him to excuse from attendance at a qualified institution the two children of the applicant, by names Quentin Snyder and Gianetta Snyder, for the school year 1985-6 for the reason they are being instructed at home.

We agree with the well-reasoned opinion of the trial court and affirm its judgment for the reasons that follow.

R.C. §3321.03, Compulsory school attendance; exceptions, provides inter alia:

> . . . Every child of compulsory school age shall attend a school or participate in a special education program that conforms to the minimum standards prescribed by the state board of education until the child:
>
> (A) Receives a diploma. . .;
>
> (B) Receives an age and schooling certificate . . .; or
>
> (C) Is excused from school under standards adopted by

> the state board of education pursuant to section 3321.04 of the Revised Code, or if in need of special education, he is excused from such programs pursuant to section 3321.04 of the Revised Code. (Emphasis added.)

R.C. §3321.04 provides inter alia:

> Every parent of any child of compulsory school age who is not employed under an age and schooling certificate must send such child to a school or a special education program that conforms to the minimum standards prescribed by the state board of education, . . .
>
> Excuses from future attendance at or past absence from school or a special education program may be granted for causes, by the authorities, and under the following conditions:
>
> (A) The superintendent of schools . . . may excuse him from attendance for any part of the remainder of the current year upon satisfactory showing of either of the following facts:
>
> (1) That his bodily or mental condition does not per-

mit his attendance at school or a special education program during such period; this fact is certified in writing by a licensed physician or, in the case of a mental condition, by a licensed physician, a licensed psychologist, licensed school psychologist or a certified board psychologist; and provision is made for appropriate instruction of the child, in accordance with Chapter 3323 of the Revised Code;

(2) That he is being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the child may, in the opinion of such superintendent, require. (Emphasis added.)

R.C. §3331.08 provides:

In case a superintendent of schools refuses to excuse a child from attendance at school for one of the reasons stated in section 3321.04 of the Revised Code, or refuses upon request to grant an age and schooling certificate as provided in section 3331.01 of the Revised Code, an appeal may be taken from such decision to the juvenile judge of the county, upon the giving of bond, within ten days there-

> after, to the approval of such judge, to pay the costs of appeal. His decision in the matter shall be final. (Emphasis added.)

Clearly, Ohio's compulsory school attendance law, R.C. §3321.03, requires every child of "compulsory school age" to attend:

1) a school, or;

2) a special education program that conforms to the minimum standards prescribed by the state board of education;

and the child is required to attend such school or special education program until the child:

(A) receives a diploma;

(B) receives an age and schooling certificate,

or

(C) is excused from:

1) school under standards a-

dopted by the state board of education pursuant to section 3321.04.

or

2) the special education program pursuant to §3321.04.

R.C. §3321.03 recognizes two types of education facilities: 1) school; and, 2) special education program. The term "school" in the context of R.C. §3321.03 and R.C. §3321.04 refers to a school chartered by the state pursuant to R.C. §3301.16, State ex rel. Nagle v. Olin (1980), 64 Ohio St. 2d 341, at 351; and the term "special education program" refers to a special education program operated pursuant to state board of education standards and authorized by Chapter 3323, City of Akron v. Lane (1979), 65 Ohio App. 2d 90, at 94-95. Every child is to remain in one or the other of

those until he receives a diploma, receives an age and schooling certificate or is excused.

We read R.C. §3321.03(C) to provide that:

> 1) If the child is to be excused from "school," then even though that excuse is to be pursuant to §3321.04, nevertheless, such excuse must be governed by standards adopted by the state board of education.
>
> 2) If the child is to be excused from "special education program," that is accomplished pursuant to §3321.04.

Now let us look at §3321.04 as it relates to the matter of excuses from attendance.

R.C. §3321.04(A)(1) provides that the superintendent of schools may excuse a child from school or special education program if his bodily or mental condition does not permit attendance at either.

However, the statute mandates that the fact of the bodily condition be certified in writing by a licensed physician, etc. The legislature itself, in §3321.04(A)(1), has established standards for the guidance of the superintendent in judging requests for excuse from school or special education program for the bodily or mentally disabled by requiring for certification of that fact by a physician, etc., and requiring that provision be made for appropriate instruction in accordance with Chapter 3323, Education of handicapped children.

On the other hand, §3321.04(A)(2) simply provides that the superintendent may excuse a child who is "being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the

child may, in the opinion of such superintendent, require." The legislature has provided no standards for the guidance of superintendents in their passing on requests for at home instruction excuses in §3321.04(A)(2). However, we are referred back to the legislative mandate of §3321.03(C), which provides that a child must stay in school until "excused from school under standards adopted by the state board of education" pursuant to §3321.04. The state board of education, apparently in response to State v. Whisner (1976), 47 Ohio St. 2d 181, and State ex rel. Nagle v. Olin, supra, promulgated Ohio Administrative Code 3301-35-08, which deals with the regulation of non-chartered and non-tax supported schools. The state board of education has promulgated no standards in compliance with the dictates of §3321.03(C) as to home teach-

ing which is authorized under §3321.04(A)(2).

We reject Superintendent's contention that "home instruction" should be considered a non-chartered, non-tax supported school and subject to standards promulgated in OAC §3301-35-08. If "home instruction" were a school, then there would be no need for a §3321.04(A)(2) "home instruction" excuse for further school attendance. OAC §3301-35-08-C provides:

> that pupil attendance shall be reported . . . parents shall be responsible for reporting their children's school enrollment or attendance. An individual in charge of the non-chartered, non-tax supported school may, as a matter of convenience, provide the report for the parent.

Thus, it is clear that §3301-35-08 applies to something other than "home instruction." We hold that "being instructed at home by a person qualified to

teacher . . ." as set out in §3321.04(A)(2) is not a school. See City of Akron v. Lane (1979), 65 Ohio App. 2d 90. Therefore, OAC §3301-35-08 is not applicable in determining the standards to be applied to a request for "home instruction," and we overrule Superintendent's second assignment of error.

Having determined that the state board of education has not adopted standards as required by R.C. §3321.03(C) for superintendents to excuse a child from school attendance for the cause "that he is being instructed at home" pursuant to §3321.04(A)(2), may the superintendent himself under the legislative grant of §3321.04 promulgate his own standards?

Superintendent, in the case at bar, adopted rules for excuses from compulsory attendance for more than one school year at a time, requiring that:

> 1) the child suffer from a disability which prevents physical attendance; or
> 2) the parents desire home instruction for religious reasons; or
> 3) an individual holding at least a baccalaureate degree must be on site each day to provide instruction for the child; or
> 4) provide instruction in accordance with course of study approved by the county board of education; or
> 5) provide periodic reports to the home school district; or
> 6) provide assurance and evidence to the home school district that the number of days of instruction and the number of hours per day are not less than required of public school students in a state chartered school.

We agree with the trial court in the case at bar and with the court in Fresh v. Searcy, supra, that there is no requirement under §3321.04 for the Superintendent to inquire into the parent's motive for requesting home instruction. Secular and/or religious oriented requests are within the purview of the statute. As to instructor competency, the statute requirement is only that the

instructor be qualified to teach the subjects "in which instruction is required" but provides no standard to determine what constitutes being qualified to teach one's own children.

We agree with the trial court that §3321.04(A)(2), unlike (A)(1), sets "no guidelines, no limits" and "is too vague to be of any assistance to the Superintendent in the exercise of [his] judgment." The State Board of Education while responding to Whisner and Olin in promulgating standards for non-public schools has not yet seen fit to implement its statutory mandate under the language of §3321.03(C).

Although not briefed nor argued by counsel in the case at bar, we feel constrained to take note of the lack of jurisdiction argument posed by the last sentence of R.C. 3331.08:

> His [the juvenile judge] decision in the matter shall be final.

That issue was raised in Fresh, supra, and two judges (Ford and Dahling) held that that language "does not indicate an express legislative intent to modify the court of appeals (sic) jurisdiction." Judge Cook dissenting stated that the court of appeals "has no jurisdiction to entertain an appeal from the decision of the juvenile judge."

In the Fresh case, the appellate court remanded the case with strong comments as to what law should guide the juvenile judge on remand. We conclude that our opinion, which agrees with the well-reasoned judgment of the trial court, does not require us to rule on whether or not the last sentence of §3331.08 in any way modifies the court of appeals' jurisdiction in this type of

case, and we decline to do so.

In sustaining the judgment of the trial court, we quote from Nagle v. Olin, supra, at 354-355: "Our decision today . . . demonstrates simply that until such time as the State Board of Education adopts minimum standards which go no further than necessary to assure the state's legitimate interest in the education of children" at home, the balance is weighed in favor of "the right of a parent to direct the education, religious or secular, of his or her children." See Whisner, supra, at 213.

We overrule both assignments of error of Superintendent and affirm the judgment of the trial court.

Earle.

E. Wise, J.

Putman, P.J. and Milligan, J. concur.

COURT OF APPEALS

ELEVENTH DISTRICT

ASHTABULA COUNTY (OHIO)

MARK A. FRESH, KAREN A. FRESH, Plaintiffs-Appellants

vs.

W.H. SEARCY, SUPERINTENDENT, ASHTABULA COUNTY SCHOOLS

Case No. 1172

Ford, J.,

By letter dated October 7, 1983, appellants, Mr. and Mrs. Mark Fresh, requested permission from the county supervisor, Mr. William Searcy, to instruct their child, Andrew, at home. On November 8, 1983, a conference was held at the office of the superintendent.

Appellants requested that a transcript of that conference be taken. That request was denied. Appellant, Mark Fresh, taped the proceedings of November 8 on an audio recorder. However, the tape was not complete as it did not include the last ten to fifteen minutes of the discussion which obtained ********* Subsequently the request by the parents to use the tape in lieu of a written transcript was denied by the superintendent. Pursuant to R.C. 3331.08 appellants filed an appeal to the Ashtabula County Court of Common Pleas, Juvenile Division. On February 10, 1984, the decision of the superintendent was upheld by the juvenile court. No transcript of the conference with the superintendent was ever certified to the juvenile court. Neither did the juvenile court accept the proffered tape recording of the conference.

Appellants are parents of Andrew Fresh. Andrew is of compulsory school age pursuant to R.C. 3321.01. Appellants, as "born-again, spirit-field Roman Catholics" prefer to instruct their son at home on religious grounds. Both the superintendent and the juvenile court denied the request for home instruction on the grounds that appellants' religious beliefs were not intruded upon by the state's compulsory school attendance laws.

Appellants in this appeal present five assignments of error.

1. The appellee superintendent erred to the prejudice of the appellants in failing to conduct a full hearing complete with transcript, in consideреing appellants religiously based request for an exemption from

compulsory attendance in order to teach their son at home.

2. The juvenile court erred to the prejudice of the appellants in hearing the appeal without having before it a complete transcript of all the testimony and evidence considered by the appellee superintendent; in refusing to accept appellants' transcript of a tape recording of the November 8, 1983, conference; and in overruling appellants' requests for the court to hear additional testimony and evidence in the appeal hearing.

3. The juvenile court erred to the prejudice of the appellants by considering matters not part of the transcript and not offered as evidence by either party.

4. The juvenile court erred to the prejudice of the appellants in fail-

ing to find that the decision of the appellee superintendent was unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record, and in failing to reverse or vacate said decision of appellee.

5. The juvenile court erred to the prejudice of the appellants by exceeding its authority and statutory jurisdiction by ordering the appellants' child to "forthwith be entered into school, either public, private or parochial that meets the state requirement of compulsory school attendance," in the context of an appeal under R.C. 3331.08 and R.C. Chapter 2506.

Appellants first, second, and third

assignments of error are addressed together as each attacks the hearing at the superintendent and juvenile court levels on procedural grounds. The assigned errors are well taken. R.C. 2506.01 reads in pertinent part:

> "Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by sections 2506.04, inclusive of the Revised Code.
>
> The appeal provided in sections 2506-.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law."

An adjudication includes an order which constitutes a determination of rights, responsibilities and legal relationships

of individuals. R.C. 2506.01. An initial determination and review of the home instruction issue under R.C. 3321.04 and 3331.08 are clearly adjudicatory in nature as the rights of various individuals are affected by the ultimate decision. Chapter 2506 does permit an appeal of such a final adjudicatory decision of an officer of any political subdivision of the state. See Burks v. Perk (1972), 6th Circuit (470 Fed. 2d 163). The decision of the superintendent under R.C. 3321.04 does fall within the contemplation of R.C. 2506.

As the statutory provisions cited are applicable, the present case presents significant procedural shortcomings. Neither a transcript nor a statement of facts were included in the record certified to the juvenile court as required although one was requested by appellants.

R.C. 2506.02; 2506.03. Without such a transcript at the superintendent's level, the juvenile court has no basis upon which to permit the introduction of evidence; nor does the court have the authority to proceed with the appeal. In re Locke (1972), 33 Ohio App. 2d 177. Thus, the assignments of error one, two, and three are sustained. The decision of the juvenile court must be reversed and remanded to the superintendent for proceedings in accordance with the Chapter 2506 procedural provisions.

Appellants in the fourth assignment of error apparently argue two issues. First, they maintain that the superintendent's refusal to permit home instruction violates their constitutional rights under the first and fourteenth amendments. Secondly, the appellants contend that the decision is against the manifest

weight of the evidence. We disagree as to both contentions.

Appellants do not attack nor do we re-examine the state's authority to establish compulsory school attendance laws. See, Parr v. State (1927), 117 Ohio St. 23. Neither is there any doubt as to the power of the state to impose reasonable regulations for the control and duration of basic education. See, Pierce v. Society of Sisters (1925), 268 U.S. 510. However, the United States Supreme Court, as well as our own state supreme court, have concluded that "the state's interest in universal education *** is not totally free from a balancing process when it impinges in fundamental rights *** such as those specifically protected by the *** first amendment, and the traditional interests of parents with respect to the religious upbringing of

their children ***." Wisconsin v. Yoder (1972), 406 U.S. 205, at 214; State v. Whisner (1976), 47 Ohio St. 2d 181; State, ex re. Nagle v. Olin (1980), 64 Ohio St. 2d 341. To ensure that state attendance laws do not interfere with the parental right under the first amendment, the established requirements cannot deny the free exercise of religious beliefs. Yoder, supra. In addition, the court in Whisner, supra, elaborated on parental rights in terms of due process under the fourteenth amendment.

> "[In Farrington, Pierce, and Meyer] the court utilized the 'liberty' concept embodied within the due process clause of the fourteenth amendment to invalidate legislation that interfer with the right of a parent to direct the education, religious or secular, of his or her children. Thus, it has long been recognized that the right of a parent to guide the education, including the religious education, of his or her children is indeed a 'fundamental right' guaranteed by the due process clause of the fourteenth amendment." Whisner,

supra, at 213, 214.

Thus, both the first amendment's free exercise clause and the due process of the fourteenth amendment serve to protect the traditional and constitutional right of parents to direct their child's educational needs within the limitations imposed by the state.

An examination of Ohio's statutes is necessary to determine if Ohio's home instruction laws comply in terms of constitutionality. R.C. 3321.04 explicitly state the circumstances under which home instruction is permitted and compulsory attendance is excused.

> "(A) The superintendent of schools of the city, exempted village, or county school district in which the child resides may excuse him from attendance for any part of the remainder of the current school year upon satisfactory showing of either of the following facts:
>
> (1) That his bodily or mental condition does not permit his attendance

> at school or a special education program during such period; ***
>
> (2) That he is being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the child may, in the opinion of such superintendent, require.
>
> R.C. 3321.04 (A).

Strict adherence to the statutory requirements is mandated. See, Akron v. Lane (1979), 65 Ohio App. 2d 90. There is no requirement under R.C. 3321.04 for the superintendent or the courts to examine a parent's motives for requesting home instruction. Religious oriented requests, as well as secular, are within the contemplation of the statute. Any reliance on the Whisner three-prong test is misplaced. Once it is established that the curriculum contemplates reasonable educational standards, and the instructor is competenet to teach those

subjects, home instruction is permitted. R.C. 3321.04 and 3331.08 comport with the limitations imposed through the first and fourteenth amendment on the state's "interest in universal education." Thus, the statutes are constitutionally sound, as parental rights in terms of due process and the free exercise of religious beliefs are protected. Yoder, supra; Whisner, supra.

The instructor competency requirement in R.C. 3321.04 merits comment at this juncture. The only requirement imposed by the above cited statute is that the instructor be qualified to teach the various topics in a primary education curriculum. Competence to teach does not imply a requirement of certification. Strict adherence to the statute, as mandated by Lane, supra, supports this rationale. Case authority in either juris-

dictions and commentaries on home instruction legislation corroborate this interpretation. 8 Univ. of Dayton L. Rev. 1 (1982); See, also, State v. Massa (1967), 95 N.J. Super. 382, 231 A. 2d 252; Commonwealthv. Roberts (1893), 159 Mass. 372, 34 N.E. 402; Perchemlides v. Frizzle (1978), Mass. Super. Ct. Unreported Case No. 16641.

Appellants have also maintained that the decision of the juvenile court is against the manifest weight of the evidence. We disgree.

Whether a specific home instruction program in in compliance with the requirements of R.C. 3321.04 is a factual question within the discretion of the superintendent. Lane, supra. Appellants have not presented any evidence to show that the instructor in their home instructions program is competent. While

Mrs. Fresh does have a degree in primary education, this alone is insufficient. There is no indication of what subjects would be taught or any evidence as to the competency to teach those subjects. Any resubmissions to the superintendent on remand should include a more thorough analysis of curriculum and a more detailed explanation as to the instructor's qualification. Thus, the decision based on the record before the juvenile court at that time ws not against the manifest weight of the evidence.

Appellants fifth assignment of error is also well taken. R.C. 3331.08 permits an appeal to the juvenile court from the superintendent's refusal to excuse a child from school attendance under R.C. 3321.04 criteria. The superintendent's authority under R.C. 3321.04 is limited to the denial of a parental request to

instruct a child at home. There is no authority under the statute to order a child's enrollment in school. Rather, the compulsory school attendance law is enforced through separate proceedings pursuant to sections 3321.18 through 3321.99 of the Ohio Revised Code. In fact, proceedings to ensure Andrew's compliance with compulsory school attendance are being continued pending the outcome of the present appeal. Thus, the juvenile court did exceed its jurisdictional authority in its order requiring Andrew's immediate enrollment in school. Enforcement of compulsory attendance remains with the pending proceedings.

In addition to the assignments of error presented by appellant, comment on a jurisdictional issue is merited. R.C. 3331.08 reads in part:

"In case a superintendent of schools

> refuses to excuse a child from attendance at school for one of the reasons stated in Section 3321.04 of the Revised Code, *** an appeal may be taken from such decision to the juvenile judge of the county, ***. His decision in the matter shall be final." (Emphasis added).

Ohio courts have repeatedly stated that there is no inherent right of appeal from a judgment of a court, and that such right must be conferred by constitution or statute. See, Middletown v. City Commissioners of Middletown (1941), 138 Ohio St. 596; In re Mahoning Valley Sanitary District (1954), 161 Ohio St. 259, certiorari denied, 348 U.S. 831. Article IV Section 3, of the Ohio Constitution reads:

> "The courts of appeal shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and such jurisdiction as may be providedby law, to review, affirm, modify, set aside, or reverse judgments or final orders of boards, commissions, officers, or tribunals, and of courts of record inferior to the court of

appeals within the district, ***."

This constitutional passage empowers the General Assembly to change the appellate jurisdiction of the court of appeals if is should desire to do so; and unless there is such legislative action, that appellate jurisdiction of the court of appeals remains. Youngstown Municipal RY. Co. v. Youngstown (1946), 147 Ohio St. 221. Thus, it is within the legislative province to specify which final orders are appealable, and those orders remain appealable until the General Assembly acts to modify the jurisdiction of the court of appeals. Cincinnati Gas and Electric Co. v. Pope (1978), 54 Ohio St. 2d 12.

However, the wording of R.D. 3331.08 does not indicate an express legislative intent to modify the court of appeals jurisdiction. We have utilized general

rules of statutory construction to reach this conclusion. Under these rules, R.C. 3331.08 is "a special statute" because it is designed for a particular purpose and covers a particular subject matter. R.C. 2505.02 provides a definition of a final appealable order.

> "*** An order affecting a substantial right made in a special proceeding *** is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial."

It may be argued that the latter special statute, R.C. 3331.08 has become an exception to those final orders under R.C. 2505.02. However, the rules of statutory constructions provide that where a general provision conflicts with a special provision, they should be construed if possible to that effect is given to both. R.C. 1.51. In addition, statutes providing for appeals, and for limitations on the right of appeal should be given a

liberal interpretation in favor of a right to appeal. Van Meter v. Segal-Schadel Co. (1966), 5 Ohio St. 2d 185. As the language of R.C. 3331.08 is not an express repeal of a litigant's right to appeal a decision of an inferior court to a court of appeals under the Ohio Constitution and R.C. 2505.02, we conclude that there is no legislative intent to abrogate appellant's right of appeal to this court under R.C. 3331.08.

As discussed above, R.C. 3321.04 and 3331.08 are constitutionally sound under both the first and fourteenth amendments. Thus, assignment of error four is without merit. However, assignments of error one, two, three, and five are well taken. On this basis, the judgment of the court is reversed and remanded for further proceedings in compliance with the procedural requirements of Chapter 2506.

Judge Donald R. Ford

Dahling, P.J., concurs

Cook, J., dissents with dissenting opinion.[1]

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[1]Dissenting opinion not included in this appendix.

"On Advice of Counsel"

Robert T. Baker, BASA Legal Counsel

GETTING A HANDLE ON HOME INSTRUCTION

Based on a completely non-scientific survey of inquiries from school districts over the last few years, it is my conclusion that the number of parents who are attempting to educate their children at home is definitely on the increase. This development would appear to be related to increased "activism" among fundamentalist religious groups. There also seems to have been a proliferation of "mail-order" academies offering instructional programs to these parents, which

may have encouraged some of them to attempt home instruction.

Whatever the cause, home instruction requests are with us and must be dealt with by school administrators -- namely, school superintendents. In the past, superintendents facing these requests have had little to guide them, particularly where religious issues were involved. In fact, it was unclear to many superintendents whether they had any authority at all to turn down a home instruction request where religious reasons were given for the request. Now, in a recent decision, the Ohio Supreme Court has answered this very basic question, which should help Ohio superintendents to "get a handle" on the home instruction phenomenon.

THE BIG PICTURE

Under Ohio's legal framework, home instruction questions must be dealt with in the context of the compulsory attendance laws. Ohio's compulsory attendance law (ORC Chapter 3321) is a set of quasi-criminal statutes which generally require all parents of school-age children (6-18) to send their children to school. Special excuses from compulsory education may be obtained from the superintendent where (1) the child's physical or mental condition make it impossible for him to attend or (2) the child is receiving instruction at home

> by a person qualified to teach the branches in which instruction is required, and such additional branches as the advancement and needs of the child may, in the opinion of the superintendent, require. ORC §3321.04(A)(2).

This language is obviously far from clear. But what has been even less clear is how far a superintendent must "bend"

when a parent claims that he is seeking home instruction on religious grounds. In the late 1970's, the Ohio Supreme Court twice ruled in favor of parents who were sending their children to religious schools which did not meet state minimum standards. Apparently deferring to these decisions, the Attorney General issued an opinion stating that where a home instruction request is based on truly-held religious beliefs, the compulsory attendance law must yield to such beliefs. 1979 OAG No. 056.

THE SCHMIDT CASE

The Schmidts of Columbiana County took this last concept just a little bit too far. The Schmidts were "born-again Christians" who believed, on religious grounds, that it was their duty to educate their children at home. They refused to apply for home instruction and

enrolled their children in a non-chartered correspondence school. When the school filed charges, the parents defended on two theories: (1) that requiring them to obtain approval for their home instruction program would infringe upon their First Amendment right to the free exercise of their religion, and (2) that the Ohio law gave so much discretion to local superintendents that it amounted to an unlawful delegation of legislative authority.

A VOTE OF CONFIDENCE FOR SUPERINTENDENTS

The Ohio Supreme Court rejected both of these arguments. (The first citation is State v. Schmidt, 29 Ohio St. 3d 32 [March 25, 1987].) First, the Court said that it would not speculate as to whether the superintendent's decision, whatever it might have been, would infringe upon the parent's religious freedom. Second,

the court affirmed the discretionary authority vested in school superintendents to determine whether home instruction programs presented by parents will be adequate, noting that such decisions could always be appealed to the juvenile court (ORC §3331.08).

SOME OBSERVATIONS

The Schmidt decision clearly establishes that parents seeking home instruction must work with the local superintendent to obtain approval for their proposed program. Such parents can no longer assume that, because their desire for home instruction is religious-based, they can ignore the compulsory attendance laws.

At the same time, it is important to recognize what the Schmidt case does not do. It does not help school superintendents decide what is an acceptable home

instruction program, or what a "qualified" instructor is. Nor does the Schmidt case tell a superintendent how far he can go before he will be deemed to have "infringed" the parents' constitutional rights. In view of these uncertainties, I would counsel superintendents to make accomodations wherever possible on home instruction requests, and to avoid over-rigorous requirements which could be viewed as contrary to the spirit of the home instruction law or an infringement upon the parents' freedom of religion.